



DEPARTMENT OF JUSTICE

28 CFR Part 0

[BOP Docket No. 1179; AG Order No. 5439-2022]

RIN 1120-AB79

Home Confinement Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act

AGENCY: Office of the Attorney General, Department of Justice.

ACTION: Proposed rule.

SUMMARY: The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) authorizes the Director of the Bureau of Prisons (“Director”), during the covered emergency period and upon a finding by the Attorney General that emergency conditions resulting from the Coronavirus Disease 2019 (“COVID-19”) pandemic materially affect the functioning of the Bureau of Prisons (“Bureau” or “BOP”), to lengthen the maximum amount of time for which a prisoner may be placed in home confinement. This proposed rule affirms that the Director has the authority to allow prisoners placed in home confinement under the CARES Act to remain in home confinement after the expiration of the covered emergency period.

DATES: Comments are due on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Please submit electronic comments through the *regulations.gov* website. In the alternative, written comments may be mailed to the Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First Street NW, Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Crista Colvin, Office of General Counsel, Bureau of Prisons, phone (202) 353-4885.

SUPPLEMENTARY INFORMATION:

I. Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at *www.regulations.gov*. If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase “PERSONAL IDENTIFYING INFORMATION” in the first paragraph of your comment. You must also locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify the confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted at *www.regulations.gov*.

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II. Discussion

A. Overview

The CARES Act authorizes the Director of the Bureau of Prisons to lengthen the amount of time a prisoner may be placed in home confinement beyond the statutory maximum normally allowed under 18 U.S.C. 3624(c)(2) as the Director deems appropriate.¹ That authority under the CARES Act exists during the period for which there is a declaration of national emergency with

¹ See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136, sec. 12003(b)(2), 134 Stat. 281, 516 (2020) (“CARES Act”).

respect to the COVID-19 pandemic and for 30 days after the termination of that declaration, provided that the Attorney General has made a finding that the emergency conditions materially affect the functioning of the Bureau of Prisons. The President declared the COVID-19 outbreak a national emergency beginning March 1, 2020; that national emergency was extended on February 24, 2021, and again on February 18, 2022, and is still in effect as of June 15, 2022.² The Attorney General made the relevant finding with respect to the Bureau on April 3, 2020. See Memorandum for the BOP Director from the Attorney General, *Re: Increasing Use of Home Confinement at Institutions Most Affected by COVID-19*, at 1 (Apr. 3, 2020), available at https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf (“April 3 Memo”).

Following guidance from the Attorney General, the Director has exercised his discretion under the CARES Act to place thousands of inmates in home confinement during the pandemic emergency. These actions removed vulnerable inmates from congregate settings where COVID-19 spreads easily and quickly and also reduced crowding in BOP correctional facilities. Inmates placed in home confinement are considered in the custody of the Bureau and are subject to ongoing supervision, including monitoring, drug and alcohol testing, and check-in requirements. They are not permitted to leave their residences except for work or other preapproved activities such as counseling. Inmates who violate these conditions may be disciplined and returned to secure custody. Violations of the conditions of home confinement requiring return have been rare during the pandemic emergency, however, and very few inmates placed in home confinement under the CARES Act have committed new crimes.

Although the CARES Act plainly states that the Director’s authority to lengthen the maximum period of home confinement exists during the covered emergency period, the Act is

² Proclamation 9994, Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 FR 15337 (Mar. 18, 2020); *see also* Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic, 86 FR 11599 (Feb. 26, 2021); Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic, 87 FR 10289 (Feb. 23, 2022).

silent about what happens to an inmate who was placed in home confinement under this authority, but who has more than the lesser of ten percent of her sentence or six months remaining in her term of imprisonment after the covered emergency period expires. As explained in a recent opinion of the Office of Legal Counsel (“OLC”), and supported by the interpretation of the Bureau, the statute allows such individuals to remain in home confinement after the covered emergency period ends, as the Director deems appropriate. This interpretation is supported by the text, structure, and purpose of the CARES Act and therefore is the better reading of the statute, as more fully explained in OLC’s December 21, 2021 opinion. *See Discretion to Continue the Home-Confinement Placements of Federal Prisoners After the COVID-19 Emergency*, 45 Op. O.L.C. __ (Dec. 21, 2021), available at <https://www.justice.gov/olc/file/1457926/download> (“*Home-Confinement Placements*”). This interpretation, which the Department adopts in promulgating this rulemaking, also aligns with the Bureau’s consistent position that the more appropriate reading of the statute is to permit the Bureau to conduct individualized assessments—as it does in making prisoner placements in other contexts—to determine whether any inmate should be returned to secure custody after the COVID-19 emergency ends.

The Department’s interpretation of the statute is also consistent with Congressional support for increasing the use of home confinement as part of reentry programming, as the Second Chance Act of 2007 and the First Step Act of 2018 demonstrate. In addition, implementation of this interpretation is operationally sound and provides flexibility in managing BOP-operated institutions as well as cost savings for the Bureau. Indeed, there is evidence that the Bureau can appropriately manage public safety concerns related to inmates in home confinement, and there are penological, rehabilitative, and societal benefits of allowing inmates to effectively prepare for life after the conclusion of their criminal sentences. Finally, as a practical matter, this interpretation permits the Bureau to consider whether returning CARES Act inmates to secure custody would increase crowding in BOP facilities and risk new, potentially

serious COVID-19 outbreaks in prisons even after the broader national emergency has passed.

For all of these reasons, the Department proposes to provide the Director with express authority and discretion to allow prisoners who have been placed in home confinement under the CARES Act to remain in home confinement after the conclusion of the covered emergency period.

B. Background

On March 13, 2020, the President of the United States declared that a national emergency existed with respect to the outbreak of COVID-19, beginning on March 1, 2020.³ COVID-19 is caused by an extremely contagious virus known as SARS-CoV-2 that has spread quickly around the world.⁴ COVID-19 most often causes respiratory symptoms, but can also attack other parts of the body. The virus spreads when an infected person breathes out droplets and particles, and another person breathes in air that contains these droplets and particles, or they land on another person's eyes, nose, or mouth.⁵ Individuals in close contact with an infected person—generally less than 6 feet apart—are most likely to get infected. Although COVID-19 often presents with mild symptoms, some people become severely ill and die.⁶ Older adults and individuals with underlying medical conditions are at increased risk of severe illness or death. As of April 26, 2022, over 988,000 people in the United States have died from COVID-19.⁷

The United States Centers for Disease Control and Prevention (“CDC”) within the Department of Health and Human Services has recognized that the COVID-19 pandemic

³ Proclamation 9994, Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 FR 15337 (Mar. 13, 2020).

⁴ U.S. Centers for Disease Control and Prevention, Basics of COVID-19 (updated Nov. 4, 2021), *available at* <https://www.cdc.gov/coronavirus/2019-ncov/your-health/about-covid-19/basics-covid-19.html> (last visited Apr. 26, 2022).

⁵ U.S. Centers for Disease Control and Prevention, How COVID-19 Spreads (updated July 14, 2021), *available at* <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited Apr. 26, 2022).

⁶ U.S. Centers for Disease Control and Prevention, Basics of COVID-19 (updated Nov. 4, 2021), *available at* <https://www.cdc.gov/coronavirus/2019-ncov/your-health/about-covid-19/basics-covid-19.html> (last visited Apr. 26, 2022).

⁷ U.S. Centers for Disease Control and Prevention, COVID Data Tracker, *available at* <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited Apr. 26, 2022).

presents unique challenges for correctional facilities, such as those the Bureau manages.⁸ These challenges include a high risk of rapid transmission due to congregate living settings, and a high risk of severe disease due to the high prevalence of pre-existing conditions and risk factors associated with severe COVID-19 illness in prison populations. In a letter to the Attorney General and the Director dated March 23, 2020, a bipartisan group of United States Senators expressed concern about the potential for COVID-19 spread among, in particular, vulnerable Bureau staff and inmates, and called upon the Bureau to use available statutory authorities to increase its utilization of home confinement to mitigate the risk.⁹

On March 26, 2020, the Attorney General issued a memorandum instructing the Director to prioritize use of home confinement, where authorized, to protect the health and safety of inmates and Bureau staff by minimizing the risk of COVID-19 spread in Bureau facilities, while continuing to keep communities safe.¹⁰ The Attorney General directed that the determination of whether to place an inmate in home confinement should be made on an individualized basis, taking into account the totality of the inmate's circumstances, the statutory requirements, and the following non-exhaustive discretionary factors:

- The age and vulnerability of the inmate to COVID-19;
- The security level of the facility housing the inmate, with priority given to inmates residing in low and minimum security facilities;
- The inmate's conduct in prison;

⁸ CDC, Considerations for Modifying COVID-19 Prevention Measures in Correctional and Detention Facilities (June 22, 2021), *available at* <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/correction-detention/COVID-Corrections-considerations-for-loosening-restrictions-Webinar.pdf> (last visited Apr. 26, 2022).

⁹ Letter for Attorney General Barr & Director Carvajal from Senator Richard J. Durbin *et al.* (Mar. 23, 2020), *available at* <https://www.durbin.senate.gov/imo/media/doc/Letter.%20to%20DOJ%20and%20BOP%20on%20COVID-19%20and%20FSA%20provisions%20-%20final%20bipartisan%20text%20with%20signature%20blocks.pdf> (last visited Apr. 26, 2022) (“Conditions of confinement do not afford individuals the opportunity to take proactive steps to protect themselves, and prisons often create the ideal environment for the transmission of contagious disease. For these reasons, it is important that consistent with the law and taking into account public safety and health concerns, that the most vulnerable inmates are released or transferred to home confinement, if possible.”).

¹⁰ Memorandum for the Director, Bureau of Prisons from the Attorney General, *Re: Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic* (Mar. 26, 2020), *available at* https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf.

- The inmate’s risk score under the Prisoner Assessment Tool Targeting Estimated Risk and Needs (“PATTERN”);¹¹
- Whether the inmate had a reentry plan that would prevent recidivism and maximize public safety; and
- The inmate’s crime of conviction and the danger the inmate would pose to the community.¹²

The Attorney General’s memorandum explained that some offenses would render an inmate ineligible for home confinement, and that other serious offenses would weigh more heavily against consideration for home confinement. It further explained that inmates who engaged in violent or gang-related activity while in prison, those who incurred a violation within the past year, or those with a PATTERN score above the “minimum” range would not receive priority consideration under the memorandum.¹³

Prior to the passage of the CARES Act, Congress had enacted three main sources of statutory authority to allow the Bureau to place inmates in home confinement as part of reentry programming. First, 18 U.S.C. 3624(c)(2) authorizes the Director to transfer inmates to home confinement for the shorter of either 10 percent of the term of imprisonment or six months. That provision also directs the Bureau to “place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted” “to the extent practicable.” Second, Congress created a pilot program in the Second Chance Act of 2007 (“SCA”), which it reauthorized and modified in the First Step Act of 2018 (“FSA”), authorizing the Attorney General to place eligible elderly and terminally ill offenders in home confinement after they have

¹¹ PATTERN is a tool that measures an inmate’s risk of recidivism and provides her with opportunities to reduce her risk score. *See, e.g.*, Federal Bureau of Prisons, PATTERN Risk Assessment, <https://www.bop.gov/inmates/fsa/pattern.jsp>. It was created pursuant to the First Step Act of 2018. *See* Pub. L. 115-391, sec. 101(a), 132 Stat. 5194, 5196–97 (2018).

¹² By April 2021, the Bureau clarified that the criminal history check covered both an inmate’s crime of conviction and her broader criminal history. *See* Memorandum for Chief Executive Officers from Andre Matevousian *et al.*, BOP, *Re: Home Confinement* (Apr. 13, 2021), *available at* https://www.bop.gov/foia/docs/Home%20Confinement%20memo_2021_04_13.pdf.

¹³ This criterion was later updated to include low and minimum PATTERN scores. *See id.*

served two-thirds of their term of imprisonment.¹⁴ Third, the FSA established earned time credits that eligible inmates could accrue through participating in recidivism-reducing programs and then apply for transfer to pre-release custody, including home confinement, without regard for the time frames set forth in 18 U.S.C. 3624(c)(2).¹⁵

The day after the Attorney General's first memorandum, on March 27, 2020, the President signed into law the CARES Act, which expanded the authority of the Director to place inmates in home confinement in response to the COVID-19 pandemic upon a finding by the Attorney General. Specifically, the Act states:

During the covered emergency period, if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau, the Director of the Bureau may lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under the first sentence of section 3624(c)(2) of title 18, United States Code, as the Director determines appropriate.¹⁶

The term "covered emergency period" refers to the period beginning on the date the President declared a national emergency with respect to COVID-19 and ending 30 days after the date on which the national emergency declaration terminates.¹⁷

On April 3, 2020, the Attorney General issued a second memorandum for the Director, finding that emergency conditions were materially affecting the functioning of the Bureau, and acknowledging that the Bureau was "experiencing significant levels of infection at several of our facilities."¹⁸ The Attorney General instructed the Director to use the expanded home confinement authority provided in the CARES Act to place the most vulnerable inmates at the facilities most affected by COVID-19 in home confinement, following quarantine to prevent the spread of COVID-19 into the community, and guided by the factors set forth in the March 26,

¹⁴ See FSA, Pub. L. 115-391, sec. 603(a), 132 Stat. 5194, 5238 (2018), *codified at* 34 U.S.C. 60541.

¹⁵ See FSA sec. 101, 132 Stat. at 5210-13, *codified at* 18 U.S.C. 3624(g). The Bureau recently published a final rule codifying Bureau procedures regarding time credits that govern pre-release custody placements under section 3624(g). See FSA Time Credits, 87 FR 2705 (Jan. 19, 2022).

¹⁶ CARES Act sec. 12003(b)(2).

¹⁷ *Id.* sec. 12003(a)(2).

¹⁸ See April 3 Memo at 1.

2020 memorandum. The second memorandum made clear that although the Bureau should maximize the use of home confinement, particularly at affected institutions, the Bureau must continue to make an individualized determination whether home confinement is appropriate for each inmate considered and must continue to act consistently with its obligation to preserve public safety.

The Bureau subsequently issued internal guidance that, in addition to adopting the criteria in the Attorney General's memoranda, prioritized for home confinement inmates who had served 50 percent or more of their sentences or those who had 18 months or less remaining in their sentences and had served more than 25 percent of that sentence.¹⁹ That guidance also instructed that pregnant inmates should be considered for placement in a community program, to include home confinement. BOP later clarified that inmates with low or minimum PATTERN scores qualify equally for home confinement, and that the factors assessed to ensure inmates are suitable for home confinement include verifying that an inmate's current or a prior offense was not violent, a sex offense, or terrorism-related.²⁰ It further implemented a requirement that inmates placed in home confinement receive instruction about how to protect themselves and others from COVID-19 transmission, based on guidance from CDC.²¹

Since March 2020, following the Attorney General's directive, the Bureau has significantly increased the number of inmates placed in home confinement under the CARES Act and other preexisting authorities. Between March 26, 2020, and January 10, 2022, the Bureau placed in home confinement a total of 36,809 inmates.²² The majority of those inmates have since completed their sentences; as of January 10, 2022, there were 7,726 inmates in home

¹⁹ See, e.g., Memorandum for Chief Executive Officers from Andre Matevousian *et al.*, BOP, *Re: Home Confinement* (Nov. 16, 2020), available at https://www.bop.gov/foia/docs/Updated_Home_Confinement_Guidance_20201116.pdf.

²⁰ See Memorandum for Chief Executive Officers from Andre Matevousian *et al.*, BOP, *Re: Home Confinement* (Apr. 13, 2021), available at https://www.bop.gov/foia/docs/Home%20Confinement%20memo_2021_04_13.pdf.

²¹ See *id.*

²² See Federal Bureau of Prisons, Frequently Asked Questions regarding potential inmate home confinement in response to the COVID-19 pandemic, <https://www.bop.gov/coronavirus/faq.jsp> (last visited Jan. 11, 2022).

confinement.²³ According to the Bureau, 4,902 of these inmates were placed in home confinement pursuant to the CARES Act.

When an inmate is placed in home confinement, he or she is not considered released from the custody of the Bureau of Prisons; rather, he or she continues serving a sentence imposed by a Federal court and administered by the Bureau of Prisons.²⁴ Although inmates in home confinement are transferred from correctional facilities and placed in the community, they are required to remain in the home during specified hours, and are permitted to leave only for work or other preapproved activities, such as occupational training or therapy.²⁵ Inmates in home confinement must submit to drug and alcohol testing, and counseling requirements. Supervision staff monitor inmates' compliance with the conditions of home confinement by electronic monitoring equipment or, in a few cases for medical or religious accommodations, frequent telephone and in-person contact. An inmate's failure to comply with the conditions of home confinement results in disciplinary action, which may include a return to secure custody or prosecution for escape.

Management of inmates in home confinement since the beginning of the COVID-19 pandemic, the largest community confinement population in recent history, has been robust. According to the Bureau, as of March 4, 2022, a small percentage of inmates placed in home confinement pursuant to the CARES Act—357 out of approximately 9,500 total individuals—had been returned to secure custody as a result of violations of the conditions of home confinement. Of this number, only 8 were returned for new criminal conduct (6 for drug-related conduct, 1 for smuggling non-citizens, and 1 for escape with prosecution).²⁶ These data suggest

²³ *See id.* (last visited Jan. 11, 2022).

²⁴ *See* 18 U.S.C. 3621(a) (“A person who has been sentenced to a term of imprisonment . . . shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed . . .”).

²⁵ Federal Bureau of Prisons Program Statement 7320.01, CN-2, Home Confinement (updated Dec. 15, 2017), available at https://www.bop.gov/policy/progstat/7320_001_CN-2.pdf.

²⁶ The term “escape with prosecution” indicates that a United States Attorney’s Office has decided to prosecute an inmate for escape under 18 U.S.C. 751. Where a United States Attorney’s Office does not prosecute, BOP imposes administrative sanctions.

that inmates placed on longer-term home confinement under the CARES Act can be and have been successfully managed, with only a limited number requiring return to secure custody for disciplinary reasons. Additional observation and research will need to be conducted to determine if this very low level of recidivism can be maintained, or if it was affected by the unique external circumstances caused by the global pandemic.

Many inmates placed in home confinement during the COVID-19 pandemic have reached the end of their term of incarceration, or will do so within the next six months. However, according to the Bureau, as of January 10, 2022, there were 2,826 total inmates placed in home confinement under the CARES Act with release dates in more than 12 months. Of this total, there were 2,272 inmates with release dates in more than 18 months; 593 inmates with release dates in 5 years or more; and 27 inmates with release dates in 10 years or more. Many of these individuals—all of whom have been successfully serving their sentences in the community—may have release dates more than six months after the expiration of the covered emergency period when it expires, and therefore may not then be eligible for placement in home confinement under 18 U.S.C. 3624(c)(2).

For all the reasons set forth above, the Department proposes to promulgate this rulemaking under the Attorney General’s authority, *see* 5 U.S.C. 301; 18 USC 4001(b)(1), to codify the Director’s discretion to allow inmates placed in home confinement pursuant to the CARES Act to remain in home confinement after the covered emergency period expires. This rulemaking reflects the interpretation of the CARES Act set forth in OLC’s December 21, 2021 opinion, is consistent with recent legislation from Congress supporting expanded use of home confinement, and advances the best interests of inmates and the Bureau from penological, rehabilitative, public health, and public safety perspectives.

C. Statutory Authority

Section 12003(b)(2) of the CARES Act authorizes the Director to place inmates in home confinement, notwithstanding the time limits set forth in 18 U.S.C. 3624(c)(2), during and for 30

days after the termination of the national emergency declaration concerning COVID-19, provided that the Attorney General has made a finding that emergency conditions are materially affecting BOP's functioning. By the Act's plain terms, the Director's authority to place an inmate in home confinement under the CARES Act expires at the end of the covered emergency period, or if the Attorney General revokes his finding. The Act is silent, however, as to whether the Director has discretion to determine whether specific individuals placed in home confinement under the CARES Act may remain there after the expiration of the covered emergency period, or whether all inmates who are not eligible for home confinement under another authority must be returned to secure custody. The Department has concluded that the most reasonable reading of the CARES Act permits the Bureau to continue to make individualized determinations about the conditions of confinement for inmates placed in home confinement under the CARES Act, as it does with respect to all prisoners,²⁷ following the end of the covered emergency period. In its recent opinion, OLC concluded that section 12003(b)(2) does not require the Bureau to return to secure custody inmates on CARES Act home confinement following the end of the covered emergency period.²⁸ The Department incorporates the analysis from OLC's opinion into the preamble of this notice of proposed rulemaking.

Even if the relevant provision of the CARES Act were considered ambiguous, however, the Department's interpretation represents a reasonable reading that would warrant deference under *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984).²⁹

1. Language and structure of the CARES Act

As the OLC opinion explains, the Department's reading of the CARES Act is grounded in the language of the relevant provision, section 12003(b)(2).³⁰ That section makes a single change to the Bureau's home confinement authority—to allow the Director to “lengthen” the

²⁷ See 18 U.S.C. 3621(a) (“A person who has been sentenced to a term of imprisonment . . . shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed . . .”).

²⁸ See *Home-Confinement Placements*, 45 Op. O.L.C. ____

²⁹ See *id.* at *2, *15.

³⁰ See *id.* at *7–9.

duration for which prisoners can be placed in home confinement relative to the maximum time periods set forth in 18 U.S.C. 3624(c)(2).³¹ Once the Director has lengthened a prisoner's amount of time in home confinement under the CARES Act and placed the prisoner in home confinement, no further action under the CARES Act is needed. After the placement is made, the Bureau's ongoing management of the inmate is further authorized by other Federal statutes.³² The CARES Act does not mandate that any period of home confinement lengthened during the covered emergency period must end after the expiration of that period.

This view is reinforced by the structure of the CARES Act, and particularly by a comparison of section 12003(b)(2) with the section of the CARES Act that immediately follows it. That section, 12003(c)(1), provides that:

During the covered emergency period, if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau, the Director of the Bureau shall promulgate rules regarding the ability of inmates to conduct visitation through video teleconferencing and telephonically, free of charge to inmates, during the covered emergency period.³³

This section differs from section 12003(b)(2) in important ways. It uses the term "covered emergency period" twice, at the beginning and the end of the section. The first use establishes that the authority of the Bureau of Prisons to promulgate rules about video and telephonic visitations exists during the covered emergency period. The second use refers to the requirement that the Bureau provide such services, free of charge, and suggests that these services were required to be provided only during the covered emergency period. In comparison, section 12003(b)(2) uses the term "covered emergency period" at the beginning of the section only, referring to the time period during which the Director may "lengthen" a term of home confinement. Section 12003(b)(2) ends with the phrase "as the Director determines appropriate," which explicitly delegates authority to the Director to determine the appropriate amount to

³¹ CARES Act sec. 12003(b)(2), 134 Stat. at 516.

³² See 18 U.S.C. 3621(a), (b).

³³ CARES Act sec. 12003(c)(1), 134 Stat. at 516.

lengthen a period of home confinement.

For all of these reasons, and for the additional reasons the operative OLC opinion explains in more detail, the Department believes that the best reading of the CARES Act is that an inmate whose period of home confinement the Director properly lengthened during the covered emergency period may remain in home confinement, at the Director's discretion, including after the covered emergency period ends.

2. OLC's previous opinion

The Department recognizes that OLC previously advised, in January 2021, that the Bureau would be required to recall all prisoners placed in home confinement under the CARES Act who were not otherwise eligible for home confinement under 18 U.S.C. 3624(c)(2) after the expiration of the covered emergency period (or if the Attorney General were to revoke his findings).³⁴ At the time of this previous opinion, the Bureau was of the view that the consequences of its proper exercise of discretion to lengthen the maximum period of home confinement during the covered emergency period could continue after the expiration of the COVID-19 emergency.³⁵ Even after OLC issued this initial opinion, the Bureau's view remained that the stronger interpretation of the CARES Act did not require all prisoners in CARES Act home confinement to be returned to secure facilities at the end of the covered emergency period.³⁶

The January 2021 OLC opinion based its conclusion on three principal determinations.³⁷ First, it found that because Congress passed the CARES Act to provide various forms of temporary relief, the Act was best read to limit its effects to the covered emergency period. Second, it reasoned that Congress must have defined the covered emergency period to extend 30 days beyond the end of the declared national emergency in order to provide the Bureau with time

³⁴ See *Home Confinement of Federal Prisoners After the COVID-19 Emergency*, 45 Op. O.L.C. __ (Jan. 15, 2021), available at <https://www.justice.gov/olc/file/1355886/download>.

³⁵ See *id.* at *4.

³⁶ See *Home-Confinement*, 45 Op. O.L.C. __, at *2, *5–7.

³⁷ See *id.* at *4–5.

to return prisoners to secure custody. And third, it reasoned that the authority “to place” a prisoner in home confinement required the exercise of ongoing legal authority due to the Bureau’s frequent interactions with inmates in home confinement, and that authority would not exist after the expiration of the covered emergency period.

But upon the Attorney General’s further review of the statutory language, and in the face of a growing body of evidence demonstrating the success of CARES Act home confinement placements, the Attorney General requested that OLC reconsider its earlier opinion. During the course of this reconsideration, the Bureau provided OLC with additional materials supporting its consistent interpretation of the CARES Act. The Bureau also explained that home confinement decisions have historically been made on an individualized basis, which serves penological goals. OLC reexamined the relevant text, structure, purpose, and legislative history, along with the Bureau’s additional materials demonstrating its consistent analysis of its own authority, and concluded the stronger interpretation of section 12003(b)(2) was not to require the wholesale return of CARES Act inmates to secure custody.

As noted above, *see supra* Part C.1, the current OLC opinion explains the textual basis for this view, including the absence of a statutory limit on the length of CARES Act home-confinement placements and the contrast between CARES Act sections 12003(b)(2) and 12003(c)(1). But the current opinion also explains the rationale underlying its departure from the three principal determinations upon which the January 2021 OLC opinion was grounded. First, OLC recognized that the temporary nature of many programs created by the CARES Act does not require that extended home confinement placements must end along with the covered emergency period for two reasons.³⁸ As an initial matter, the extended home confinement program is time-limited: the Director’s authority to place inmates on extended home confinement lapses after the expiration of the covered emergency period. In addition, the consequences of

³⁸ *See id.* at *12.

temporary CARES Act authorities may extend past the emergency period. For example, although the authority to provide loans under the CARES Act’s Paycheck Protection Program was limited, the loans granted pursuant to that authority will mature over time.³⁹

Second, OLC did not interpret the 30-day grace period following the end of the national emergency as necessarily suggesting that Congress intended the Bureau to use that time to return CARES Act inmates to secure custody.⁴⁰ There is no legislative history to support such a reading, and there are other plausible explanations for the grace period, including broader forms of administrative convenience and benefit, such as letting BOP finish processing home-confinement placements that were in progress and to which BOP had already devoted resources. Moreover, the 30-day grace period also applies to section 12003(c), which provides for free video and teleconferencing for inmates during the covered emergency period. This undercuts the rationale that Congress included the 30-day grace period for any particular reason other than administrative convenience.

Finally, OLC concluded that the appropriate action to focus on in determining the meaning of section 12003(b)(2) is the authority to “lengthen” the maximum period of home confinement, which is a discrete act.⁴¹ The term “to place” derives from a different statute—18 U.S.C. 3624(c)(2)—and even assuming the act of “placement” involves an ongoing process, the Bureau fully completes the act of “lengthening” the time for which an individual may be placed in home confinement under the CARES Act when an inmate is transferred to home confinement under the Act. Once the Bureau has appropriately lengthened an inmate’s maximum period of home confinement under the CARES Act, sections 3624(c)(2), 3621(a), and 3621(b) provide the Bureau with ongoing authority to manage that placement.

This proposed rule accords with OLC’s revised views and codifies the Director’s

³⁹ See CARES Act sec. 1102, 134 Stat. at 286–97; *id.* at sec. 1109, 134 Stat. at 304–06.

⁴⁰ See *Home-Confinement Placements*, 45 Op. O.L.C. ___, at *11–12.

⁴¹ See *id.* at *7–9.

authority to allow inmates placed in home confinement under the CARES Act to remain in home confinement after the end of the covered emergency period.

3. *Chevron* deference

Even if section 12003(b)(2) of the CARES Act were found to be ambiguous, the Department believes its view would be entitled to deference as a reasonable reading of a statute it administers. Under *Chevron*, if a court concludes that such a statute is ambiguous—a determination typically referred to as *Chevron* step one—it must defer to the agency’s interpretation as long as it is “based on a permissible construction of the statute” under *Chevron* step two. *Chevron*, 467 U.S. at 843.

At the outset, the Department has authority to promulgate rules to manage the Bureau of Prisons, and to administer CARES Act section 12003(b)(2). Congress vested the Attorney General with broad control over the “control and management of Federal penal and correctional institutions” and the ability to “promulgate rules for the government thereof.”⁴² Congress also delegated general authority to the heads of executive departments, including the Attorney General, to issue regulations for the “government of [the] department, the conduct of its employees, [and] the distribution and performance of its business.”⁴³ Congress plainly intended the Department to use its discretion, drawing on the expertise of the Attorney General and the Director, to administer section 12003(b)(2) of the CARES Act. First, that section empowers the Attorney General to make a finding, during the pandemic emergency, that the pandemic has materially affected the functioning of the Bureau. Second, the Attorney General’s finding, in turn, triggers the Director’s discretion to lengthen the maximum amount of time an inmate may be placed in home confinement, “as the Director determines appropriate.”⁴⁴ This proposed rule, which codifies the Department’s understanding of its authority under the CARES Act in

⁴² 18 U.S.C. 4001(b)(1).

⁴³ 5 U.S.C. 301.

⁴⁴ CARES Act sec. 12003(b)(2), 134 Stat. 516.

furtherance of the management of Bureau institutions, is issued pursuant to these authorities and, when finalized, is intended to have the force of law.

Although the Department believes its understanding of CARES Act section 12003(b)(2) is the best reading of the statute for the reasons explained above, were a court to disagree and find the statute unclear, the Department's interpretation would be reasonable for those same reasons and the additional reasons explained below. As has already been discussed, the Department's interpretation of the CARES Act is aligned with the relevant statutory language, structure, purpose, and history. The Department's interpretation is also consistent with congressional action demonstrating an interest in increasing the Bureau's use of home confinement. It is in the best operational interests of the Bureau and the institutions it manages. And it is in the best penological interests of affected inmates. For these additional reasons, detailed further below, if the statute is deemed ambiguous, the Department's interpretation of section 12003(b)(2) represents a reasonable exercise of the Attorney General's and the Director's policy discretion that would be entitled to deference.

D. Congressional Intent

The Department's interpretation of the CARES Act is consistent with bipartisan legislation signaling Congress's interest in expanding the use of home confinement and placing inmates in home confinement for longer periods of time. Such legislative efforts have been part of Congress's broader push to manage prison populations, facilitate inmates' successful reentry into communities, and reduce recidivism risk.⁴⁵ These efforts were undertaken over years of bipartisan negotiations and garnered broad support across the political spectrum, beginning with

⁴⁵ See, e.g., H.R. Rep. No. 115-699, at 22–24 (2018) (“The federal prison system needs to be reformed through the implementation of corrections policy reforms designed to enhance public safety by improving the effectiveness and efficiency of the federal prison system in order to control corrections spending, manage the prison population, and reduce recidivism.”); H.R. Rep. No. 110-140, at 1–5 (2007) (“The Second Chance Act will strengthen overall efforts to reduce recidivism, increase public safety, and help States and communities to better address the growing population of ex-offenders returning to their communities. The bill focuses on development and support of programs that provide alternatives to incarceration, expand the availability of substance abuse treatment, strengthen families, and expand comprehensive re-entry services. The bill is a product of multi-year bipartisan negotiations and enjoys support from across the political spectrum.”).

the Second Chance Act of 2007 and continuing in the First Step Act of 2018.⁴⁶

In the SCA, Congress increased the Bureau's discretion to place inmates in home confinement in two ways. First, it instructed the Director to ensure, to the extent practicable, that a prisoner spends a portion of the final months of her term of imprisonment in conditions designed to prepare her for reentry into the community, including community correctional facilities, and explicitly provided the Director with discretion to place inmates in home confinement for a period not to exceed the last six months or 10 percent of their terms of imprisonment.⁴⁷ Second, the SCA established a pilot program to allow the Bureau to place eligible non-violent elderly offenders in home confinement for longer periods.

Congress further expanded the Bureau's use of home confinement through the FSA in three contexts. First, the FSA demonstrated Congress's interest in increasing the amount of time low-risk offenders spend in home confinement, while continuing to leave decisions about individual prisoners to the Bureau's discretion, by providing that "[t]he Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under [18 U.S.C. 3624(c)(2)]."⁴⁸ Second, the FSA reauthorized and expanded the pilot program to place eligible elderly offenders in home confinement by lowering the age requirement from 65 to 60 years old, reducing the amount of the sentence imposed an inmate must have served to qualify for the program, and allowing it to be applied to eligible terminally ill inmates regardless of age.⁴⁹ Third, the FSA created an incentive for eligible inmates to participate in programs shown to reduce their risk of recidivism by allowing individuals to earn time credits, which may be used for earlier transfer to

⁴⁶ The House of Representatives passed the Second Chance Act by a vote of 347 to 62, and the Senate passed the Act without amendment by unanimous consent. *See* H.R. 1593 – Second Chance Act of 2007, Congress.gov, available at <https://www.congress.gov/bill/110th-congress/house-bill/1593/actions?r=5&s=5> (last visited Apr. 28, 2022). The House of Representatives passed the First Step Act by a vote of 358 to 36, and the Senate passed the Act by a vote of 87 to 12. *See* S.756 – First Step Act of 2018, Congress.gov, available at <https://www.congress.gov/bill/115th-congress/senate-bill/756/actions?r=6&s=9> (last visited Apr. 28, 2022).

⁴⁷ SCA, Pub. L. 110-199, sec. 251(a), 122 Stat. 657, 692–93 (2008).

⁴⁸ FSA sec. 602, 132 Stat. 5238.

⁴⁹ *Id.* sec. 603(a), 132 Stat. 5238.

prerelease custody, including home confinement, notwithstanding the time limits included in 18 U.S.C. 3624(c)(2).⁵⁰ The statute provides that an inmate placed in home confinement under this incentive program “shall remain in home confinement until the prisoner has served not less than 85 percent of the prisoner’s imposed term of imprisonment,” and that the Bureau should provide progressively less restrictive conditions on inmates who demonstrate continued compliance with the conditions of prerelease custody.⁵¹

Although the CARES Act was a response to the emergency conditions presented by the COVID-19 pandemic, Congress’s expansion of the Bureau’s home confinement authority as part of that response is consistent with its recent and clear indication of support for expanding the use of home confinement based on the needs of individual offenders. These indications of congressional intent further bolster the Department’s view that any ambiguity in the CARES Act should be read to provide the Director with discretion to allow inmates placed in home confinement who have been successfully serving their sentences in the community to remain there, rather than return such inmates to secure custody *en masse* without making an individualized assessment or identifying a penological, rehabilitative, public health, or public safety basis for the action. As explained below, in the Bureau’s expert assessment, whether an inmate should remain in home confinement is a decision best made upon careful consideration of the appropriate management of Bureau institutions, penological, rehabilitative, public health, and public safety goals, and the totality of the circumstances of individual offenders.

E. Operational Benefits

Allowing certain inmates who were placed in home confinement under the CARES Act to remain in home confinement after the expiration of the covered emergency period will also afford a number of operational benefits. These benefits include operational flexibility in

⁵⁰ *Id.* sec. 101, 132 Stat. at 5198, *codified in relevant part at* 18 U.S.C. 3632(d); *id.* at sec. 102, 132 Stat. 5210–13, *codified at* 18 U.S.C. 3624(g).

⁵¹ *See* 18 U.S.C. 3624(g)(2)(A)(iv), (g)(4).

managing BOP-operated institutions and cost savings for the Bureau. It is further supported by evidence demonstrating that the Bureau can appropriately manage public safety concerns related to inmates in home confinement, and by the penological, rehabilitative, public health, public safety, and societal benefits of allowing inmates to effectively prepare for successful reentry after the conclusion of their criminal sentences. Finally, this interpretation permits the Bureau to take into account whether returning CARES Act inmates to secure custody, thereby increasing populations in BOP facilities, risks new, potentially serious COVID-19 outbreaks in prisons even after the broader national emergency has passed.

One of the vital tools in operating a correctional system is the ability to effectively manage bedspace based on the needs of the offender, security requirements, and agency resources. Congress has explicitly provided the Bureau responsibility for maintaining custody of Federal inmates⁵² and discretion to designate the place of those inmates' imprisonment.⁵³ Courts have recognized the Bureau's authority to administer inmates' sentences,⁵⁴ supporting this management principle. The Bureau's ability to control populations in BOP-operated institutions as well as, where appropriate, in the community, allows the Bureau flexibility to respond to circumstances as varied as increased prosecutions or responses to local or national emergencies or natural disasters. Providing the Bureau with discretion to determine whether any inmate placed in home confinement under the CARES Act should return to secure custody will increase the Bureau's ability to respond to outside circumstances and manage its resources in an efficient manner that considers both public safety and the needs of individual inmates.

Supervision of inmates in home confinement is also significantly less costly for the

⁵² 18 U.S.C. 3621(a) ("A person who has been sentenced to a term of imprisonment . . . shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed . . .").

⁵³ See 18 U.S.C. 3621(b) (providing that "[t]he Bureau of Prisons shall designate the place of the prisoner's imprisonment," taking into account factors such as facility resources; the offense committed; the inmate's history and characteristics; recommendations of the sentencing court; and any pertinent policy of the United States Sentencing Commission). Section 3621(b) also authorizes the Bureau to direct the transfer of a prisoner at any time, subject to the same individualized assessment. See *id.*

⁵⁴ See, e.g., *United States v. Wilson*, 503 U.S. 329, 335 (1992); *Rodriguez v. Copenhaver*, 823 F.3d 1238, 1242 (9th Cir. 2016).

Bureau than housing inmates in secure custody. In Fiscal Year (FY) 2019, the cost of incarceration fee (COIF) for a Federal inmate in a Federal facility was \$107.85 per day; in FY 2020, it was \$120.59 per day.⁵⁵ In contrast, according to the Bureau, an inmate in home confinement costs an average of \$55 per day—less than half of the cost of an inmate in secure custody in FY 2020. Although the Bureau’s decision to place an inmate in home confinement is based on many factors, where the Bureau deems home confinement appropriate, that decision has the added benefit of reducing the Bureau’s expenditures. Such cost savings were among the intended benefits of the First Step Act.⁵⁶

As the extremely low percentage of inmates placed on CARES Act home confinement returned to secure custody shows, the Bureau can effectively manage public safety concerns associated with the low-risk inmates placed in home confinement under the CARES Act for longer periods of time. Indeed, of the nearly 5,000 inmates placed in home confinement under the CARES Act, as of January 8, 2022, only 322 had been returned to secure custody for any reason, and only eight for committing a new crime. Individuals placed in home confinement under the CARES Act, like other inmates in home confinement, remain in the custody of the Bureau. Before being placed in home confinement, inmates sign agreements which require consent to submit to home visits and drug and alcohol testing, acknowledgement of monitoring requirements, and an affirmation that they will not engage in criminal behavior or possess firearms. Under these agreements, individuals placed in home confinement are subject to electronic monitoring; check-in requirements; drug and alcohol testing; and transfer back to secure correctional facilities for any significant disciplinary infractions or violations of the agreement.⁵⁷ CARES Act inmates who remain in home confinement after the covered

⁵⁵ Annual Determination of Average Cost of Incarceration Fee (COIF), 86 FR 49060, 49060 (Sept. 1, 2021).

⁵⁶ *See, e.g.*, H.R. Rep. No. 115-699, at 22–24 (“The federal prison system needs to be reformed through the implementation of corrections policy reforms designed to enhance public safety by improving the effectiveness and efficiency of the federal prison system in order to control corrections spending, manage the prison population, and reduce recidivism.”).

⁵⁷ *See* Federal Bureau of Prisons Program Statement 7320.01, CN-2, Home Confinement (updated Dec. 15, 2017), available at https://www.bop.gov/policy/progstat/7320_001_CN-2.pdf.

emergency period would continue to be subject to these requirements until the end of their sentences, and possibly into a term of supervised release. Data show that these procedures have been working to preserve public safety where inmates were placed on extended home confinement under the CARES Act, and the Department expects that such measures will continue to be effective after the end of the covered emergency period.⁵⁸ Thus, in the Department's view, the aspects of a criminal sentence that preserve public safety can be managed in this context while also allowing individuals to more effectively prepare for life when their criminal sentences conclude.

Congress has demonstrated through the passage of the SCA and the FSA an increasing interest in appropriately preparing inmates for reintegration into society, and an ongoing reevaluation of the societal benefits of incarceration versus non-custodial rehabilitative programs.⁵⁹ Home confinement provides penological benefits as one of the last steps in a reentry program. An inmate would usually be moved over the course of a sentence to progressively less secure conditions of confinement—often from a secure prison, to a residential reentry center, to home confinement—to provide transition back into the community with support, resources, and supervision from the agency.⁶⁰ Under typical circumstances, inmates who have made the transition to home confinement would not be returned to a secure facility absent a disciplinary

⁵⁸ Previous research has similarly shown that inmates can maintain accountability in home confinement programs. *See, e.g.,* Darren Gowen, *Overview of the Federal Home Confinement Program 1988-1996*, 64 Fed. Prob. 11, 17 (2000) (finding that 89 percent of 17,000 individuals placed in home confinement between 1988 and 1996 successfully completed their terms without incident). In addition, studies have found that efforts to decarcerate prisons in other contexts, which were not limited to home confinement measures, did not harm public safety. *See, e.g.,* Jody Sundt *et al.*, *Is Downsizing Prisons Dangerous? The Effect of California's Realignment Act on Public Safety*, 15 Criminology & Pub. Policy 315 (2016).

⁵⁹ *See, e.g.,* H.R. Rep. No. 115-699, at 22–24; SCA sec. 3(a), 122 Stat. at 658 (“The purposes of the Act are . . . to rebuild ties between offenders and their families, while the offenders are incarcerated and after reentry into the community, to promote stable families and communities; . . . to encourage the development and support of, and to expand the availability of, evidence-based programs that enhance public safety and reduce recidivism, such as substance abuse treatment, alternatives to incarceration, and comprehensive reentry services . . .”).

⁶⁰ Congress demonstrated support for this type of logical progression toward reentry in the First Step Act. *See* FSA sec. 101, 132 Stat. 5212, *codified at* 18 U.S.C. 3624(g)(4) (“In determining appropriate conditions for prisoners placed in prerelease custody pursuant to this subsection, the Director of the Bureau of Prisons shall, to the extent practicable, provide that increasingly less restrictive conditions shall be imposed on prisoners who demonstrate continued compliance with the conditions of such prerelease custody, so as to most effectively prepare such prisoners for reentry.”).

reason, because the purpose of home confinement is to allow inmates to readjust to life in the community. Removal from the community would therefore frustrate this goal. And the widespread return of prisoners to secure custody without a disciplinary reason would be unprecedented. Moreover, as findings in the SCA indicate, inmates who are provided the types of benefits home confinement can afford, such as opportunities to rebuild ties to family and to return to the workplace and to the community, may ultimately be less likely to recidivate.⁶¹ Although placements under the CARES Act were not made for reentry purposes, the best use of Bureau resources and the best outcome for affected offenders is to allow the agency to make individualized assessments of CARES Act placements with a focus on inmates' eventual reentry into the community. Allowing the Bureau discretion to determine whether inmates who have been successfully serving their sentences in the community should remain in home confinement will allow the Bureau to ground those decisions upon case-by-case assessments consistent with penological, rehabilitative, public health, and public safety goals, rather than categorically requiring all inmates placed on CARES Act home confinement to be treated the same.⁶²

Finally, the Bureau needs flexibility to consider whether continued home confinement for CARES Act inmates is in the interest of the public health, and whether reintroduction of CARES Act inmates into secure facilities would create the risk of new outbreaks of COVID-19 among the prison population—even after the conclusion of the broader pandemic emergency. It is now well established that congregate living settings, and correctional facilities in particular, heighten

⁶¹ See SCA sec. 3(b), 122 Stat. 658–60 (“According to the Bureau of Prisons, there is evidence to suggest that inmates who are connected to their children and families are more likely to avoid negative incidents and have reduced sentences. . . . Released prisoners cite family support as the most important factor in helping them stay out of prison. . . . Transitional jobs programs have proven to help people with criminal records to successfully return to the workplace and the community, and therefore can reduce recidivism.”).

⁶² Such individualized assessments are consistent with direction the Bureau has received from Congress in other contexts. For example, Congress has made clear that the Bureau must base its determination of an inmate's place of imprisonment on an individualized assessment that takes into account factors including the inmate's history and characteristics. See 18 U.S.C. 3621(b).

the risk of COVID-19 spread due to multiple factors.⁶³ Data have shown that increased crowding in prisons, which makes social distancing difficult, is associated with increased incidence of COVID-19.⁶⁴ Although COVID-19 vaccines are widely available and effective at preventing infection, serious illness, and death, not all incarcerated persons will elect to receive COVID-19 vaccinations,⁶⁵ and breakthrough infections may occur even in fully vaccinated persons, who are then able to spread the disease.⁶⁶ More contagious variants of the virus that causes COVID-19 could exacerbate the spread, and it is unknown whether currently available vaccines will be effective against new variants that may arise. Accordingly, it is appropriate for the Department to consider whether the reintroduction into prison populations of individuals placed in home confinement, in part, upon consideration of their vulnerability to COVID-19⁶⁷ and the resulting increased crowding in prison settings could lead to new COVID-19 outbreaks, including breakthrough cases in fully vaccinated inmates and infections in the most vulnerable prisoners.

For all of these reasons, the Department believes that it is not only statutorily authorized, but also operationally appropriate for the Director to have the discretion to allow individuals placed in home confinement under the CARES Act to remain in home confinement after the end

⁶³ See, e.g., CDC, For People Living in Prisons and Jails (updated Feb. 15, 2022), available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/living-prisons-jails.html> (last visited Apr. 29, 2022); Nat'l Academies of Sciences, Engineering, and Medicine, *Decarcerating Correctional Facilities during COVID-19: Advancing Health, Equity, and Safety* 23–44 (2020), available at <https://doi.org/10.17226/25945> (last visited Apr. 29, 2022).

⁶⁴ Abigail I. Leibowitz et al., *Association Between Prison Crowding and COVID-19 Incidence Rates in Massachusetts Prisons, April 2020-January 2021*, 181 JAMA Internal Med. 1315 (2021); see also Nat'l Academies of Sciences, Engineering, and Medicine, *Decarcerating Correctional Facilities during COVID-19: Advancing Health, Equity, and Safety* 26–27 (2020), available at <https://doi.org/10.17226/25945> (last visited Apr. 29, 2022).

⁶⁵ Early studies demonstrated that around 64 percent of persons incarcerated in BOP institutions who were offered COVID-19 vaccinations accepted them. See Liesl M. Hagan et al., *COVID-19 vaccination in the Federal Bureau of Prisons, December 2020-April 2021*, 39 Vaccine 5883 (2021).

⁶⁶ CDC, The Possibility of COVID-19 after Vaccination: Breakthrough Infections (updated Dec. 17, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/why-measure-effectiveness/breakthrough-cases.html> (last visited Apr. 29, 2022).

⁶⁷ See Memorandum for the Director, Bureau of Prisons from the Attorney General, *Re: Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic* (Mar. 26, 2020), available at https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf (directing the Bureau to consider, among other discretionary factors, “the age and vulnerability of [an] inmate to COVID-19” when assessing which inmates should be placed in home confinement).

of the covered emergency period. Following the issuance of a final rule, the Bureau will develop, in consultation with the Department, guidance to explain criteria that it will use to make individualized determinations as to whether any inmate placed in home confinement under the CARES Act should be returned to secure custody.

III. Regulatory Certifications

A. Regulatory Flexibility Act

The Attorney General, under the Regulatory Flexibility Act (5 U.S.C. 605(b)), reviewed this proposed rule and by approving it certifies that it will not have a significant economic impact upon a substantial number of small entities for the following reasons: This regulation pertains to the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

B. Executive Orders 12866 and 13563

This proposed rule has been drafted and reviewed in accordance with section 1(b) of Executive Order 12866 (Regulatory Planning and Review) and section 1(b) of Executive Order 13563 (Improving Regulation and Regulatory Review).

This proposed rule falls within a category of actions that the Office of Management and Budget (OMB) has determined to constitute a "significant regulatory action" under section 3(f) of Executive Order 12866 because it may raise novel legal or policy issues arising out of implementation of section 12003(b)(2) of the CARES Act and, accordingly, it was reviewed by OMB.

The Department has assessed the costs and benefits of this rulemaking as required by Executive Order 12866 section 1(b)(6) and has made a reasoned determination that the benefits of this rulemaking justify its costs.

The economic impact of this proposed rule is limited to a specific subset of inmates who were placed in home confinement pursuant to the CARES Act and are not otherwise eligible for

home confinement at the end of the covered emergency period. As of January 10, 2022, 4,902 inmates had been placed in home confinement under the CARES Act; 2,826 of those inmates had release dates in more than 12 months. The Department expects these numbers will continue to fluctuate as inmates continue to serve their sentences and the Bureau continues to conduct individualized assessments to make home confinement placements under the CARES Act for the duration of the covered emergency period.

The Bureau has realized significant cost savings by placing eligible inmates in home confinement under the CARES Act relative to housing those inmates in secure facilities, and it expects those cost savings to continue for inmates who remain in home confinement under the CARES Act following the end of the covered emergency period. Although the Bureau has not yet published the average cost of incarceration fees (COIF) for Fiscal Year (FY) 2021, in FY 2020 the average COIF for a Federal inmate in a Federal facility was \$120.59 per day.⁶⁸ The average cost for an inmate in home confinement was \$55 per day, representing a cost savings of approximately \$65.59 per day, per inmate, or approximately \$23,940.35 per year, per inmate. Although the numbers will likely differ for FY 2021 and beyond, the Department and the Bureau expect that the proposed rule will benefit them as a result of the avoidance of costs the Bureau would otherwise expend to confine the affected inmates in secure custody. Because the affected inmates are currently serving their sentences in home confinement, there will be no new costs associated with this proposed rulemaking.

As explained above, the proposed rule will also have operational, penological, and health benefits. These include increasing the Bureau's ability to control inmate populations in BOP facilities and in the community, allowing it to be responsive to changed circumstances; empowering the Bureau to make individualized assessments as to whether inmates placed in home confinement should remain in home confinement after the end of the covered emergency

⁶⁸ Annual Determination of Average Cost of Incarceration Fee (COIF), 86 FR 49060, 49060 (Sept. 1, 2021).

period, taking into account, for example, penological goals and the benefits associated with an inmate establishing family connections and finding employment opportunities in the community; and allowing the Bureau to weigh the ongoing risk of new COVID-19 outbreaks in BOP facilities against the benefit of returning any inmate to secure custody.

The Department has determined that there is no countervailing risk to the public safety that outweighs the benefits of this rulemaking. The percentage of inmates placed in home confinement under the CARES Act that have had to be returned to secure custody for any violation of the rules of home confinement is very low; the number of inmates who were returned as a result of new criminal activity is a fraction of that. The vast majority of inmates on CARES Act home confinement have complied with the terms of the program and have been successfully serving their sentences in the community. Thus, in the Department's assessment, public safety considerations do not undercut the benefits associated with allowing inmates placed in home confinement under the CARES Act to remain in home confinement after the expiration of the covered emergency period.

Other potential costs relate to inmates serving longer sentences in home confinement as a result of the CARES Act. These inmates might lose the opportunity to participate in potentially beneficial programming and treatment offered only in BOP facilities, which they might have otherwise taken advantage of if placed in secure custody. In addition, most sentencing courts anticipated that offenders would be incarcerated in a secure facility, and there may be concern that placing inmates in home confinement for longer periods might not appropriately honor the intent of the courts, the interests of prosecuting United States Attorney's Offices,⁶⁹ any impact on victims or witnesses, possible deterrence effects in the community, or other aspects of the agency's mission. These costs are all mitigated, however, by retaining the Director's discretion

⁶⁹ The Bureau, in its discretion, forwards certain home confinement cases to the prosecuting United States Attorney's Office for the input of prosecutors, taking any objections into account when approving or denying those cases.

to determine whether any inmate should be returned to secure custody based on an individualized assessment. The Department and the Bureau will consider the factors referenced in this paragraph when developing common criteria to govern these case-by-case assessments, thereby promoting operational efficiency and equitable treatment of offenders.

D. Executive Order 12988 (Civil Justice Reform)

This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Civil Justice Reform).

E. Executive Order 13132 (Federalism)

This proposed rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, under Executive Order 13132, the Attorney General determines that this proposed regulation does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

F. Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*

G. Congressional Review Act

This proposed rule is not a major rule as defined by the Congressional Review Act, 5 U.S.C. 804.

H. Paperwork Reduction Act of 1995

This proposed rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521.

List of Subjects in 28 CFR Part 0

Authority delegations (Government agencies), Government employees, National defense, Organization and functions (Government agencies), Privacy, Reporting and recordkeeping requirements, Whistleblowing.

Accordingly, by virtue of the authority vested in me as Attorney General, including 5 U.S.C. 301, 18 U.S.C. 4001 and 28 U.S.C. 509, 510, part 0 of title 28 of the Code of Federal Regulations is proposed to be amended as follows:

PART 0--ORGANIZATION OF THE DEPARTMENT OF JUSTICE

1. The authority citation for part 0 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515-519.

2. In § 0.96, add paragraph (u) to read as follows:

§ 0.96 Delegations.

* * * * *

(u) With respect to the authorities granted under the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136):

(1) During the “covered emergency period” as defined by the CARES Act, when the Attorney General determines that emergency conditions will materially affect the functioning of the Bureau of Prisons (Bureau), lengthening the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under 18 U.S.C. 3624(c)(2), as the Director determines appropriate.

(2) After the expiration of the “covered emergency period” as defined by the CARES Act, permitting any prisoner placed in home confinement under the CARES Act who is not yet otherwise eligible for home confinement under separate statutory authority to remain in home confinement under the CARES Act for the remainder of her sentence, as the Director determines appropriate.

(3) This section concerns only inmates placed in home confinement under the CARES Act. It has no effect on any other inmate, including those placed in home

confinement under separate statutory authorities.

Dated: June 14, 2022.

Merrick B. Garland,
Attorney General.

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